



FH
[REDACTED]

STATE OF WISCONSIN
Division of Hearings and Appeals

In the Matter of

[REDACTED]
[REDACTED]
[REDACTED]
[REDACTED]

DECISION

MDV/153505

PRELIMINARY RECITALS

Pursuant to a petition filed November 18, 2013, under Wis. Stat. § 49.45(5), and Wis. Admin. Code § HA 3.03(1), to review a decision by the Kenosha County Human Service Department in regard to Medical Assistance, a hearing was held on December 18, 2013, at Kenosha, Wisconsin.

The record was held open until December 23, 2013, to give the parties an opportunity to supplement the record. A letter from [REDACTED], indicating that Petitioner's condition has deteriorated such that her day program can no longer handle her, has been marked as Exhibit 6; a copy of the durable power of attorney has been marked as Exhibit 7; the Undue Hardship Waiver Request has been marked as Exhibit 8, and a letter from [REDACTED] has been marked as Exhibit 9.

The issues for determination are whether the agency correctly added the remaining divestment penalty period apportioned to Petitioner's deceased spouse, to Petitioner's penalty period and whether the agency correctly denied the Petitioner's request for an undue hardship waiver.

There appeared at that time and place the following persons:

PARTIES IN INTEREST:
Petitioner:

[REDACTED]
[REDACTED]
[REDACTED]
[REDACTED]

Respondent:

Department of Health Services
1 West Wilson Street, Room 651
Madison, Wisconsin 53703

By: Karen Mayer, Fair Hearing Coordinator
Roberta Bloner, Economic Support Specialist
Kenosha County Human Service Department
8600 Sheridan Road
Kenosha, WI 53143

ADMINISTRATIVE LAW JUDGE:
Mayumi M. Ishii
Division of Hearings and Appeals

FINDINGS OF FACT

1. Petitioner (CARES # [REDACTED]) is a resident of Kenosha County.
2. In June 2010, the Petitioner's son took possession of \$25,000 of the Petitioner's assets from a bank in Georgia. (Exhibit 3)
3. In August 2010, the Petitioner's son sold her home for \$205,000 and took possession of the funds from the sale of the home. (Exhibit 3)
4. On July 5, 2011, the Petitioner gifted liquid assets of \$13,000 to one daughter and \$14,000 to another daughter. (Exhibit 3)
5. On July 17, 2012, an application for MA was submitted on behalf of the Petitioner. (Exhibit 3)
6. On August 23, 2012, the agency issued a notice to Petitioner, advising her that it had determined that she divested the aforementioned assets and that a penalty period of 1,192 days was calculated by the agency. (Exhibit 3)
7. The agency split the penalty period between the Petitioner and her spouse, imposing a penalty of 596 days upon each, from July 17, 2012 through March 5, 2014. (Exhibit 3)
8. On September 25, 2012, a request for an undue hardship waiver was made on behalf of Petitioner. (Exhibit 3)
9. The request was denied and Petitioner filed an appeal that was received by the Division of Hearings and Appeals on October 2, 2012. (Exhibit 3)
10. On December 20, 2012, the Division of Hearings and Appeals issued a decision stating that the agency had properly denied the Petitioner's application and properly denied the Petitioner's request for an undue hardship waiver. (Exhibit 3)
11. Petitioner's spouse passed away in April 2013 and on October 21, 2013, Petitioner's daughter/power of attorney, filed another request for an undue hardship waiver on behalf of the Petitioner. (Exhibits 8 and 9).
12. On October 28, 2013, the agency sent Petitioner a notice indicating that her spouse had only served 284 days of the 596 day divestment penalty imposed upon him before he passed away, so that the remaining 312 days of his portion of the divestment penalty would be added to the 596 day penalty that she was currently serving, bringing her total penalty to 908 days. The agency further indicated that the penalty would run from July 17, 2012 through January 10, 2015. (Exhibit 4)
13. On that same day, the agency sent the Petitioner a notice indicating that her request for an Undue Hardship Waiver was denied. (Exhibit 4)
14. Petitioner's daughter/Power of Attorney filed a request for fair hearing that was received by the Division of Hearings and Appeals on October 31, 2013. (Exhibit 1)
15. The whereabouts of Petitioner's son is unknown. (Testimony of Petitioner)
16. Petitioner's daughters do not wish to return Petitioner's monetary gifts, because they feel entitled to the money for the care they provided to their parents. (Testimony of Petitioner)

DISCUSSION

The administrative rules concerning divestments that occurred after August 9, 1989 are found under Wis. Admin. Code §DHS 103.065 (4), which states, “An institutionalized individual or someone acting on behalf of that individual who disposes of resources at less than fair market value ... shall be determined to have divested. A divestment results in ineligibility for MA for the institutionalized individual...” *Wis. Admin. Code §DHS 103.065 (4)(a) See Also Wis. Stats. §49.453(2); 42 U.S.C. §1396P(c)(1)(A) and (B)*

The “Look Back” period for transfers/divestments made after February 8, 2006 is 60 months. *Wis. Stats. §49.453(1)(f); 42 U.S.C. §1396P(c)(1)(B)*

I. Did the Agency Correctly Deny Petitioner’s Request for an Undue Hardship Waiver?

It is the agency’s contention that the Petitioner’s daughter/POA has not met the undue hardship criteria because she has not demonstrated any attempt to recover the divested assets, nor has she shown that the assets are unrecoverable.

The agency’s position is based upon the Medicaid Eligibility Handbook (MEH) §17.17.5 which states, “The applicant (or his/her representative) must submit the following verification of hardship:

1. A statement signed by the individual (or his/her representative) which describes whether the assets are recoverable, and if so, the attempts that were made to recover the divested assets, **and**
2. Proof that an undue hardship would exist if the penalty period is applied (as follows).

If the ***member is currently institutionalized***, s/he must submit a copy of the notification sent from the LTC facility which states both the date of involuntary discharge and alternative placement location or other proof that if the hardship waiver is not granted, the individual will be deprived of medical care such that the individual’s health or life would be endangered; or deprived of food, clothing, shelter, or other necessities of life.

If the ***member is applying for Community Waivers COP, FamilyCare, IRIS or Pace Partnership*** s/he must submit an estimate of the cost of the LTC services needed to meet his/her medical and remedial needs (as determined by the waivers case manager) and an estimate of costs for food, shelter, clothing and other necessities of life.

However, MEH §17.17.5 is a bit at odds with MEH §17.17.1, which states:

17.17.1 Introduction

A divestment penalty period must be waived when the imposition of the penalty period deprives the individual of:

- Medical care such that the individual’s health or life would be endangered;
- or**
- Food, clothing, shelter, or other necessities of life.

Further, it is somewhat inconsistent with the Federal Regulations and State Administrative Rules because neither the Federal Regulations, nor the State Rules require both return/attempted return of the asset and a showing of undue hardship. They require only a showing of one or the other.

42 U.S.C. §1396P(c)(2)(C) states that a person who divests assets is ineligible for Medicaid UNLESS, “ a satisfactory showing is made to the State (in accordance with regulations promulgated by the Secretary) that

- (i) the individual intended to dispose of the assets either at fair market value, or for other valuable consideration,
 - (ii) the assets were transferred exclusively for a purpose other than to qualify for medical assistance, **or**
 - (iii) all assets transferred for less than fair market value have been returned to the individual;
- or**
- (D)** the State determines, under procedures established by the State (in accordance with standards specified by the Secretary), that the denial of eligibility would work an undue hardship as determined on the basis of criteria established by the Secretary.

The procedures established under subparagraph (D) shall permit the facility in which the institutionalized individual is residing to file an undue hardship waiver application on behalf of the individual with the consent of the individual or the personal representative of the individual. While an application for an undue hardship waiver is pending under subparagraph (D) in the case of an individual who is a resident of a nursing facility, if the application meets such criteria as the Secretary specifies, the State may provide for payments for nursing facility services in order to hold the bed for the individual at the facility, but not in excess of payments for 30 days.

Similarly, Wis. Admin. Code §DHS 103.065 (4)(d), states:

An institutionalized individual who has been determined to have made a prohibited divestment under this section shall be found ineligible for MA as defined under s. [DHS 101.03 \(95\)](#) unless:

1. The transfer of property occurred as the result of a division of resources as part of a divorce or separation action, the loss of a resource due to foreclosure or the repossession of a resource due to failure to meet payments; or
2. It is shown to the satisfaction of the department that one of the following occurred:
 - a. The individual intended to dispose of the resource either at fair market value or for other valuable consideration;
 - b. The resource was transferred exclusively for some purpose other than to become eligible for MA;
 - c. The ownership of the divested property was returned to the individual who originally disposed of it; **or**
 - d. The denial or termination of eligibility would work an undue hardship. In this subparagraph, "undue hardship" means that a serious impairment to the institutionalized individual's immediate health status exists.

It is the assertion of Petitioner's daughter/POA that Petitioner's request for an undue hardship waiver satisfies the requirement of Wis. Admin. Code §DHS 103.065 (4)(d) 2. d., because imposition of the penalty period places her mother at imminent and significant risk of injury or death. Petitioner's daughter argues that this is so, because the Petitioner suffers from Alzheimer's disease, escapes from her home and wanders - sometimes in busy streets, and because her day program can no longer handle her aggressive behavior. Petitioner's medical condition is confirmed by her physician in Exhibit 9 and her inability to remain in her day program is corroborated by Exhibit 6.

However, the Petitioner does not meet the definition of an “institutionalized individual”. The Wisconsin statutes defer to the federal regulations for its definition of an “institutionalized individual”. *Wis. Stats. §49.453(e)* The Federal regulations state that, “the term ‘institutionalized individual’ means an individual who is an inpatient in a nursing facility, who is an inpatient in a medical institution and with respect to whom payment is made based on a level of care provided in a nursing facility”, or who would otherwise qualify for institution long term care Medicaid, but is receiving services in the community under a Medicaid Waiver. *42 U.S.C. §1396P(h)(3)*

The Department of Health Services has further honed the definition of an “institutionalized person” to mean someone who:

1. Participates in Community Waivers, or
2. Has resided in a medical institution for 30 or more consecutive days, or
3. Is likely to reside in a medical institution for 30 or more consecutive days, as attested to by the medical institution.

MEH §27.4.1

There is no evidence that Petitioner has been participating in a Community Waivers Medicaid program and it is undisputed that Petitioner has not been residing in a medical institution/nursing facility. Although Petitioner’s physician indicated that Petitioner is unable to care for herself because she suffers from Alzheimer’s disease and Sundowner’s Syndrome, which causes her to become aggressive and physical with her caregivers, neither he nor any medical institution clearly attested to whether Petitioner’s need for institutionalization is such that she is likely to be in a medical institution for 30 consecutive days. Indeed, he stated, “There will be a time she will need to be in an Extended Care Facility...”, implying the need for institutionalization lies in the future, not the present.

Because the record does not support a finding that the Petitioner meets the definition of an “institutionalized person” it is found that the agency correctly denied Petitioner’s request for an undue hardship waiver.

Petitioner’s daughter/POA should note that she can always reapply for an undue hardship waiver on behalf of her mother, if she is placed in a nursing home for 30 days or if a nursing home/hospital attests to the likelihood that Petitioner will reside in a medical institution for 30 or more consecutive days.

II. Did the Agency Correctly Add the Remainder of Petitioner’s Deceased Spouse’s Penalty Period to Petitioner’s Penalty Period?

42 USC §1396P(c)(4) states, “A State (including a State which has elected treatment under section [1396a\(f\)](#) of this title) may not provide for any period of ineligibility for an individual due to transfer of resources for less than fair market value except in accordance with this subsection. In the case of a transfer by the spouse of an individual which results in a period of ineligibility for medical assistance under a State plan for such individual, a State shall, using a reasonable methodology (as specified by the Secretary), apportion such period of ineligibility (or any portion of such period) among the individual and the individual’s spouse if the spouse otherwise becomes eligible for medical assistance under the State plan.” *Emphasis added*

The Wisconsin Statutes echo the federal regulations. According to *Wis. Stats. §49.453 (3)(c)*, “If the spouse of an individual makes a transfer of assets that results in a period of ineligibility under this section and otherwise becomes eligible for medical assistance, the department shall apportion the period of ineligibility between the individual and the spouse. The Department shall promulgate rules to establish a reasonable methodology for apportioning a reasonable period of ineligibility under this paragraph.”

The Department of Health Services promulgated policies regarding the apportionment of a penalty period between spouses in MEH §17.14:

17.14 Both Spouses Institutionalized

If the community spouse made a divestment that resulted in a penalty period for the institutionalized spouse...apportion the penalty period between the spouses at the time the community spouse enters an institution and applies for Medicaid.

Apportion the penalty period as follows:

1. Find the divested amount that was used to calculate the original penalty period.
2. Calculate how much of the divested amount remains to be satisfied by:
 - a. Multiplying the average nursing home private pay rate x the number of
 - Complete months of the penalty period already served for divestments prior to 1/1/09 **or**
 - the days of the penalty period already served for divestment on or after 1/1/09.
 - b. Subtracting the result from the original divested amount.
 - c. Calculated the penalty period for the remaining divested amount
 - d. Divide the new penalty period equally between the 2 spouses.

If either spouse leaves the institution or dies, add the remainder of his/her penalty period to the other spouse's penalty period.

In August 2013, the agency correctly split the divestment penalty period between Petitioner and her husband. When Petitioner's spouse passed away, the agency correctly followed the Department of Health Services MEH policy manual and added her deceased spouse's penalty period to her penalty period.

CONCLUSIONS OF LAW

1. The agency correctly denied Petitioner's request for an Undue Hardship Waiver
2. The agency correctly added the remainder of Petitioner's deceased spouses penalty period to Petitioner's penalty period.

THEREFORE, it is

ORDERED

That the Petition is dismissed.

REQUEST FOR A REHEARING

This is a final administrative decision. If you think this decision is based on a serious mistake in the facts or the law, you may request a rehearing. You may also ask for a rehearing if you have found new evidence which would change the decision. Your request must explain what mistake the Administrative Law Judge made and why it is important or you must describe your new evidence and tell why you did not have it at your first hearing. If you do not explain these things, your request will have to be denied.

To ask for a rehearing, send a written request to the Division of Hearings and Appeals, P.O. Box 7875, Madison, WI 53707-7875. Send a copy of your request to the other people named in this decision as "PARTIES IN INTEREST." Your request for a rehearing must be received no later than 20 days after the date of the decision. Late requests cannot be granted.

The process for asking for a rehearing is in Wis. Stat. § 227.49. A copy of the statutes can be found at your local library or courthouse.

APPEAL TO COURT

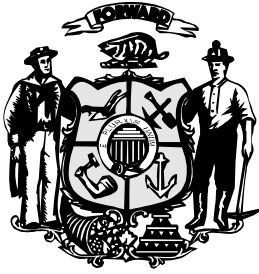
You may also appeal this decision to Circuit Court in the county where you live. Appeals must be served and filed with the appropriate court no more than 30 days after the date of this hearing decision (or 30 days after a denial of rehearing, if you ask for one).

For purposes of appeal to circuit court, the Respondent in this matter is the Department of Health Services. After filing the appeal with the appropriate court, it must be served on the Secretary of that Department, either personally or by certified mail. The address of the Department is: 1 West Wilson Street, Room 651, Madison, Wisconsin 53703. A copy should also be sent to the Division of Hearings and Appeals, 5005 University Avenue, Suite 201, Madison, WI 53705-5400.

The appeal must also be served on the other "PARTIES IN INTEREST" named in this decision. The process for appeals to the Circuit Court is in Wis. Stat. §§ 227.52 and 227.53.

Given under my hand at the City of Milwaukee,
Wisconsin, this 28th day of January, 2014.

\sMayumi M. Ishii
Administrative Law Judge
Division of Hearings and Appeals



State of Wisconsin\DIVISION OF HEARINGS AND APPEALS

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The preceding decision was sent to the following parties on January 28, 2014.

Kenosha County Human Service Department
Division of Health Care Access and Accountability